[redacted]

Petitioner,

v.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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[redacted]

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IN THE

Supreme Court of the United States

October Term, 1964

No.....

IDAHO SHEET METAL,

Petitioner.

vs.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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Idaho Sheet Metal, your petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the above case pending in that Court.

OPINIONS BELOW

The opinion of the United States District Court in and for the District of Idaho, Southern Division, en-

tered March 7, 1963 (Appendix A, infra, pages 1-2) is not reported. The opinion of the Court of Appeals for the Ninth Circuit entered August 10, 1964 (Record, folio 73 through 82) has not yet been reported.

JURISDICTION

The judgment of the Court below (Record folio 82) was entered on August 10, 1964. A timely petition for rehearing was denied on September 15, 1964 (Record folio 95), five days after its filing (Record folio 85). The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

QUESTION PRESENTED

1. Are the employer's employees so closely related and directly essential to the production of goods for commerce as to be engaged in the production of goods for commerce;

2. Is the employer's shop a retail establishment and entitled to the exemption as such under Section 13(a) of the Fair Labor Standards Act?

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix B, infra, page 1; Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the act

of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*:

Section 3(j)

Section 13(a)(2)

Section 13(a)(4).

STATEMENT

These are two actions brought by the Secretary of Labor under the Fair Labor Standards Act. Section 17 of the act authorizes the district Courts of the United States to restrain violations of the Act, while Section (16)(c) authorizes the Secretary of Labor to bring suit on behalf of employees to recover amounts due them under Section 6 and 7, minimum wage and overtime provisions of the Act. Accordingly, cause No. 18887 was brought by the Secretary pursuant to Section 17 to enjoin further violations by defendant of the act's overtime provisions, while cause No. 18888 was instituted under Section 16 (c) to recover unpaid overtime compensation on behalf of one of defendant's employees, William D. Coombs. The two actions were consolidated for trial at the conclusion of which the District Court held that defendant's employees were not within the coverage of the act, and, further, that defendant's enterprise was an exempt establishment (Appendix A pages 1-2). Notices of Appeal were filed and on September 24, 1963 a motion to consolidate these actions for purposes of appeal was granted by the U.S. Court of Appeals, Ninth Circuit.

The petitioner operates a sheet metal shop in a small agricultural area, Burley, Idaho. The shop was established in 1957 for the purpose of serving the local communities needs in the custom fabrication and making of sheet metal or tin items to be sold or installed for the general public including merchants, farmers, individuals, and in some instances manufacturer's product. The products were all made and sold at a retail price computed by adding a profit to the cost of labor and materials.

Some time after the shop was established, manufacturers of frozen food products located in the community and intermittently at irregular intervals used the facilities of the defendant for the installation of such items as air ducts, air conditioning equipment, storage tanks, elevator, buckets, endless conveyor belts, conductors, and chutes.

The Court of Appeals for the Ninth Circuit reversed the judgment of the District Court and remanded the case to the District Court to enter judgment in behalf of the plaintiff (Record folio 82).

REASONS FOR GRANTING THE WRIT

I.

The decision of the U.S. Court of Appeals in the Ninth Circuit is squarely in conflict with this court's decision in *Mitchell v. H. P. Zachry Company*, 362 U.S. 310.

In the Zachry case, the employees in question were employed by an independent employer constructing a dam to increase the reservoir capacity to create and expanded reservoir for the district. The water impounded by the district was supplied partially to consumers locally within the state of Texas, including a city. Approximately forty per cent to fifty per cent of all the water consumed from the system is accounted for by industrial or interstate users, and it is agreed the water is essential to these operations.

In the Zachry case the facility was constructed to serve a local purpose, but at the same time it furnished water to firms that were engaged in production of goods for commerce. This court in deciding the case ruled that even though the water was "directly essential" to the production of goods for commerce, the employer's operation was not "closely related" as it had the attributes of a local establishment and was therefore not directly essential to the production of goods for commerce.

With regard to the petitioner's business, the evidence clearly shows that the establishment has a background and history of local purpose innaugurated to serve local needs. It was also shown that the requirements by the interstate producers were irregular and intermittent and that the interstate producers operate on a seasonal basis and the services of the defendant are not required at all times.

The circuit court proceeded upon the erroneous assumption that this court in the Zachry case held, in ef-

fect, that the construction of the dam was not directly essential to the interstate producers. This is directly in conflict with the express holding in the Zachry case:

> "Moreover, though construction and operation of this dam are equally 'directly essential' to the producers who require the water impounded and distributed, neither the construction or the operation of the dam was designed for their use."

The correct test then is whether or not the plant or facility is constructed and designed and intended strictly for the use of the interstate producer. In the case before this court, the undisputed evidence shows that this establishment was designed to service local needs and was in existence and operation before the interstate producers established plants in the Burley area.

The circuit court of appeals for the Ninth Circuit inappropriately applied the holding in the *Roland Electrical Company v. Walling*, 326 U.S. 657 to the facts and type of industry engaged in by your Petitioner and concluded that the holding in the early 1946 case was dispositive of the issues before it. In the Rowland case the defendant was engaged in manufacturing, installing, and servicing electrical motors, generators, etc. It is amply clear from the evidence in this case that the defendants are not manufacturers. They have no assembly line type of production, but merely perform all services through specifications and on a "custom-made" basis. The Roland Electrical Company was not established to serve a local demand and had no history or

background as a retail establishment serving a local need. For this reason it differs substantially from the Zachry case and the case presently before this court.

The decision in this case is also squarely in conflict with this court's decision in Kirschbaum v. Walling, 316 U. S. 517, 62 Supreme Court 1116, 86 L.Ed. 1638 (1942); Borden Company v. Borella, 325 U. S. 679, 65 S.Ct. 1223, 89 L.Ed. 1865 (1945); and 10 East 40th Street Company v. Callus, 325 U. S. 578, 65 S.Ct. 1227, 89 L.Ed. 1806 (1945). In the Kirschbaum case this court interpreted the phrase "necessary to the production of goods for commerce" as extending to employees of the owner of a loft building who were engaged in the operation and the maintenance of the building where the tenants were principally engaged in the production of clothing for shipment in interstate commerce. This court pointed out that even though the owner of the building was in no way affiliated with the tenants and did not produce goods for commerce the work of his employees had such a close and immediate tie with the production by the tenants that they were an essential part of it and therefore the employees occupations were necessary to such production. In the Borden company case this court reached a similar conclusion in holding that the act applied to porters, elevator operators, and night watchmen employed in the New York City office building owned by Borden Company, an interstate producer of food products. The whole building was largely tenanted by Borden's essential offices, but there was no production facilities located in the building. This court

found that the extensive and detailed supervision, management and control of operations maintained by executives and administrators located in the building were found to be just as essential to the productive activity of Borden's scattered operating facilities as the direct physical labor performed in the loft in Kirschbaum. Since the employees in the Borden case stood in the same relationship to "production" as did those in Kirschbaum, this court held that occupations were necessary to production for commerce and covered by the act. In the Callus case, however, a totally different result was reached by this court even though the employees of the building performed the same task as those involved in the Kirschbaum and Borden company cases, supra. In Callus office space in a 48 story New York office building was held out for general tenancy and was leased to over 100 tenants engaged in a great variety of enterprises. Even though a substantial portion of the tenants were shown to be enaged in the production of goods for interstate commerce this court concluded:

> "Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business. Mere separation of an occupation from the physical process of production does not preclude application of the fair labor standards act. But remoteness of a particular occupation from the physical process is a relevent

factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods."

325 U. S. at 583, 65 S.Ct. at 1229, 89 L.Ed. 1806. The fundamental distinction between Kirschbaum on the one hand and Callus on the other is that in the Kirschbaum and Borden Company cases the buildings were "dedicated" solely to the use of tenants engaged in the production of goods for commerce. In Kirschbaum and Borden the buildings were not open for general tenancy or to the general public, but were, in effect designed and intended for use by those interstate producers. There was a lasting, dominant relationship between the activities for which the building was used and production for commerce. In Callus, on the other hand, it is the absence of any such relation to interstate commerce which removed the employment from the coverage of the act. Any connection with commerce in Callus was purely fortuitous and subject to change. The major reason being that in the Callus case the building was held out for general tenancy and was leased to over 100 tenants engaged in a great variety of enterprises. While in the Kirschbaum and Borden cases the buildings were not open for general tenancy and restricted to the sole and exclusive use of the interstate producers. This distinction is of singular importance in this case, in that the outstanding feature of the employment of the defendant corporation is a complete lack of dedication to production for commerce. The defend-

ant's custom sheet metal operations are held out on the same terms for the use of anyone in the geographical area served. The business is a local business in nature and was not instituted for the sole purpose of serving large processing firms. The business was *in existence* and *serving the local populace before the processing plants commenced their operation.*

It is submitted that the custom sheet metal business has revealed by the record "spontaneously satisfies the common understanding of what is local business" and the employees of such an employer are engaged in local business.

As a matter of fact, this particular destruction drawn between Callus on the one hand and Kirschbaum and Bordon on the other was also discussed and followed in Mitchell v. H. P. Zachry Company, supra.

II.

The decision of the U. S. Circuit Court of Appeals for the Ninth Circuit in this case is in conflict with a prior Ninth Circuit case, Goldberg v. Roberts, 291 F. 2d. 532 (Ninth Circuit-1961) and Wirtz v. Modern Trashmoval, Inc., 323 F. 2d. 451 (Fourth Circuit-1963).

Section 13(a)(2) of the Fair Labor Standards Act, as revised in 1949, specified three tests which must be met by an establishment seeking to qualify for the retail service establishment exemption: (1) 50% of its annual dollar volume of sales of goods or services must

be made within the state; (2) 75% of its total sales volume must not be for resale; (3) 75% of its total sales volume must be recognized as retail sales or services in the particular industry. (Appendix B, page 1)

In 1959 this Court in Mitchell v. Kentucky Finance Company, 359 U. S. 290, 79 S.Ct. 756, 3 L.Ed.(2) 815 (1959) added a further test, namely, that a business must have a traditionally "retail concept." This court also decided that this "retail concept" is to be determined by the status of the industry prior to 1949. In other words, if the industry under consideration had been determined by a 1949 administrator's ruling or case law not to be a retail establishment, this status maintains and it will not be said to be retail after the 1949 amendment.

In Goldberg v. Roberts, the Ninth Circuit held that a "letter shop" engaged in the business of addressing, stuffing and mailing of letters for business establishments was by nature not outside the "retail concept," so as to be exempt from wage record keeping and shipping of provisions of the Fair Labor Standards Act. In arriving at this conclusion, the Ninth Circuit was called upon to determine whether or not letter shops had a retail or non-retail status prior to 1949. In determining that letter shops do not have a retail status the U. S. Court of Appeals stated the following:

"In our opinion, then, the trial court erred in characterizing the pre-1949 status of mailing shops to be 'retail.' There is no indication that pre-1949 clas-

sification of letter shops was based on the ground that such shops sell their services to business, rather than to individuals for personal consumption. Thus, the pre-1949 classification of letter shops has not been shown to be founded upon the 'business use test,' which Congress specifically rejected in 1949. (See Mitchell v. Kentucky Finance Company, Supra. at pages 293-294, 79 Supreme Court at page 758.)"

The Court of Appeals states here that the proper test to be used is whether or not the pre-1949 status of an establishment was determined by an application of the repudiated "business use test." The Ninth Circuit then held that as long as the pre-1949 status was not attributed as a result of the business use test its non-retail position is still in effect. In the case presently before this Court the Ninth Circuit stated the following with regard to the proper test to use in order to determine whether or not the business is "outside the retail concept."

"The trial court here decided that defendant's business was within the retail concept in the following manner:
It noted that in Roland, Supra, the Supreme Court had held that concern outside the retail concept. There the court said (page 666):

'(T) The exemption reaches employees of only such retail or service establishments as are comparable to the local merchant, corner grocer, or filling station operator who sells to or serves ultimate

consumers who are at the end of, or beyond, that "flow of goods in commerce" which it is the purpose of the act to reach."

"It seems obvious that *if the tests applied in the Roland case are applied here, we must conclude that the defendant is not within the retail exemption.*" (Emphasis ours) (Record, Folio 80)

In other words, the Ninth Circuit approved and applied the test used in the Roland case, Supra. This is, of course, patently erroneous in that the "business use test" used in the Roland case has been repudiated and over-ruled by the 1949 amendment. This decision makes no mention, as they did in the Roberts case, as to whether or not the test used to classify the industry was the business use test.

It should also be kept in mind that the industry under consideration in the Roland case was a plant that manufactured, repaired and installed electrical generators for firms in interstate commerce. This activity is not even remotely related to the custom sheet metal industry.

In addition, if the test used in Goldberg v. Roberts, namely whether or not the pre-1949 status was due to an application of the repudiated business use test, was applied to this case, it would have to be held that the question of retail status is open and not determined by pre-1949 rulings. This is so in that the Roland case, supra, and Guess v. Montague, 140 F.2d. 500; Walling v. Thompson, 65 F. Supp. 686, are cases cited by the

administrator establishing that "industrial blacksmiths" "welding shops" are not retail in nature. These cases, without exception, arrived at this conclusion by an application of the repudiated "business use test."

On the other hand, in Wirtz v. Modern Trashmoval, Inc., Supra, the Fourth Circuit, the court asked the question as to whether or not the specific industry under consideration has ever been given a status prior to 1949.

> "In the absence of any prior determination classifying trash removal as within or outside the traditional retail concept, we are urged to consider modern activities analagous to those of other types of establishments considered inelligible for exemption in cases in an administrative regulation such as 29 CFR, Paragraph 779.317. The suggested approach was followed in Goldberg v. Sarvis, 294, Fed. 2d 841 (Third Circuit 1961), where the court decided that a 'shopping service,' whose employees posed as customers and evaluated the efficiency of clerks in retail establishments for the managements thereof, could not be a 'retail or service establishment,' because its service was similar to that of several types of establishments long considered by the administrator as ordinarily lacking in retail characteristics and because the service, a specialized one, which the public had no occasion to use, had never been recognized as a retail service. The secretary also contents that Modern's business is closely analagous to that of supplying janitorial services for offices and industrial establishments, a business recently held to be

outside the 'retail concept' in Goldberg v. Saf-T-Clean, Inc., 209 Fed. Sup. 343 (S.D. Fla. 1962), and Goldberg v. Eagle Maintenance and Supply Company, 197 Fed. Sup. 27 (S.D. Cal. 1961).

We agree that close and persuasive comparisons existed in Goldberg v. Sarvis, Supra, especially where the service offered had utility only to businessmen, and we note that the employees there involved, on occasion, crossed state lines to render services. However, in none of the types of establishments called to our attention do we find such similar characteristics as will compel us to hold that establishments offering and performing trash removal services in the manner shown by this record is beyond the 'retail concept'."

In other words, this court requires that the administrator had to have made a determination on the specific business involved. He would not be permitted to restrict the purpose of the exemption by the application of loose analogy. On the other hand, the Ninth Circuit classified the defendant's business as "machine shops and foundaries" "industrial blacksmiths" and "establishments engaged in reconditioning industrial tools." There is not even a close analogy between the custom sheet metal industry and those particular establishments. In addition, as stated above, the status of machine shops, foundries, industrial blacksmiths and establishments engaged in sharpening and reconditioning industrial tools were given their status as a result of an application of the "business use test."

III.

The question presented here is of grave importance to those businesses instituted and operated as a local business serving a small geographical area.

By the ruling the Ninth Circuit, the administrator may now take businesses that have no prior 1949 status and if he can find a similarity in any respect to that of a business having a status it is possible for him to place them altogether and deny a retail exemption to businesses deserving the same. While this court stated in the Kentucky Finance case, Supra., that the enactment was not meant to broaden fields of exemption, certainly the 1949 amendment was not intended by Congress to be administered in such a way that all businesses will not be allowed an exemption because they have, in some remote manner, a similar characteristic to a business given a status prior to 1949. The reasoning of the Fourth Circuit in Modern Trash Removal, Inc. is the better reasoned of the opinions and should be followed.

CONCLUSION

To protect the integrity of this Court's decision in the Callus and Zachry cases and to resolve a conflict between the decisions of the Ninth Circuit and the Fourth Circuit, and to allow businesses engaged in local activity to have the question of their retail status determined by the characteristics of their own individual businesses rather than by businesses not even re-

motely related to them, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO,
SOUTHERN DIVISION

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

vs.

HIGGINS, INC., a corporation,

Defendant.

No. 3743
MEMORANDUM
OPINION

By this action the Secretary of Labor seeks to recover unpaid overtime compensation alleged to be due three employees of defendant corporation under the Fair Labor Standards Act, 29 U.S.C. §201 et seq.

The facts are similar to those in the cases of Wirtz v. Idaho Sheet Metal Works, Inc., Nos. 3745 and 3752, decided this day, except for the following: during the period in question, this defendant sold a smaller portion of its goods (about 33 per cent) to processing plants; the firm had been located in the Burley, Idaho, area much longer than the Idaho Sheet Metal Works; the Higgins company had more counters and shelves, and sold a greater variety of its goods at retail; it had agency contracts with outside salesmen.

The Court's decision in the Idaho Sheet Metal Works

cases applies with greater force in this case, where the defendant is even more markedly a local enterprise.

Under the evidence herein, and the authorities cited in the Idaho Sheet Metal Works cases, the Court finds that plaintiff is not entitled to receive anything under and by virtue of his complaint.

Counsel for the defendant shall prepare Findings of Fact, Conclusions of Law and a proposed Judgment, and shall submit copies of the same to counsel for plaintiff and the originals to the Court.

Dated this 7th day of March, 1963.

FRED M. TAYLOR,
United States District Judge

APPENDIX B

"SEC. 3. As used in this Act—

"(j) 'Produced' means produced, manufactured, mined, handled, or any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

The relevant portions of Section 13 read as follows:

"SEC. 13(a). The provisions of sections 6 and 7 [the Act's minimum wage and overtime requirements] shall not apply with respect to * * *

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale, and is recognized as retail sales or services in the particular industry; or * * *

"(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a re-

tail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *."

In the Supreme Court of the United States

October Term, 1964

No. 754

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

IDAHO SHEET METAL WORKS, INC., a Corporation,

Appellee.

Nos. 18,887
18,888

[Aug. 10, 1964]

Appeal from the United States District Court for the District of Idaho.

Before POPE, HAMLEY and MERRILL, Circuit Judges.

POPE, Circuit Judge.

The Secretary of Labor brought two actions in the court below for the purpose of enforcing compliance by the defendant Idaho Sheet Metal Works, Inc. with certain requirements of the Fair Labor Standards Act.[1] In one action the Secretary sought to enjoin further violations by the defendant of the overtime provisions of the Act.[2] In the other action the Secretary sought recovery of unpaid overtime compensation on behalf of one of the defendants' employees.[3] The two actions were consolidated for trial and after dismissal of the actions by the trial court, with prejudice, the appeals therefrom were consolidated for hearing in this court.

The facts here are undisputed. It is conceded that during the years 1959 through 1961, the defendant did not pay its employees, some twelve in number, in accordance with the overtime provisions of the Fair Labor Standards Act, and it is admitted that this practice has continued thereafter. It was stipulated that if recovery was had in the action to recover the employee's overtime compensation, recovery should be for the sum of $500 plus costs.

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[1]Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, et seq. Other amendments of 1961 (75 State. 65) are not material here.

[2]Such injunction proceedings are authorized by Sec. 17 of the Act (29 U.S.C. Sec. 217).

[3]Such an action is authorized by Sec. 16(c) of the Act (29 U.S.C. Sec. 216(c)).

Upon the trial and in this court two questions were presented. The first question was whether any of the defendant's employees were engaged in the production of goods for commerce within the meaning of the Act. Since the record shows that the defendant's employees were engaged in the performance of work for its customers who were producing goods for interstate commerce, the query, stated more particularly, was whether defendant's employees were engaged in a "closely related process or occupation directly essential" to the interstate production of its customers.[1] The second question presented is whether the defendant is a retail establishment exempt from the requirements of the Act under Sec. 13(a).[2] The trial court found against the Secretary on both questions.

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[1]The section of the Act relevant in this regard is Section 3(j) which reads: "Sec. 3. As used in this Act—(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

[2]The relevant portions of Sections 13 read as follows: "Sec. 13(a). The provisions of sections 6 and 7 [the Act's minimum wage and overtime requirements] shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishments annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale, and is recognized as retail sales or services in the particular industry; or * * * (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a

During the years 1959 through 1961, the defendant was engaged in manufacturing, installing, maintaining and repairing equipment made of sheet metal for five large potato processors located in the general area of Burley, Idaho, where defendant's place of business was located. During that period 83 per cent of defendant's gross income was derived from those customers. In addition it performed comparable work for five other companies which were engaged in producing goods for interstate commerce including sugar mills, flour mills, seed and grain companies, and a container corporation. This accounted for an additional 3 per cent of defendant's gross income. The equipment which defendant fabricated or repaired for these companies included tanks of a capacity to hold 5,000 pounds of peeled potatoes, hoods for carrying off steam, and elevator buckets and chutes for transferring items within the plants.[*] During many weeks in those years the employees of defendant spent a substantial part of their total work

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retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: Provided, that more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *."

[*] The employees were sheet metal workers and they were employed at defendant's sheet metal plant which was a high ceilinged cinder-block building. The building was not equipped with any of the facilities common in a retail establishment in that it had no display windows, sales counters or cash registers. The equipment consisted of work benches and machinery for working on sheet metal. The metals used in the fabrication mentioned were primarily stainless steel, galvanized iron, black iron plate, aluminum and copper. The fabricated and installed equipment was not maintained in stock by the defendant but it was made to order in each case.

hours in these activities relating to the fabricating of equipment for the customers mentioned. A substantial portion of this work was carried on in the customer's plant.

In dealing with the question whether the defendant's employees were engaged in production of goods for commerce within the meaning of Sec. 3 (j) of the Act, the court, while finding in so many words that the defendant's business was "not closely related to nor directly essential to the production of goods for or in commerce,"[1] based its conclusion upon its finding that the defendant's "enterprise is a local business." The reasoning adopted by the trial court was that once it had determined that the employer was engaged in a "local business" it followed that his employees could not be engaged in the production of goods for commerce.

The trial court was led to this reasoning by its interpretation of the decision in Mitchell v. H. B. Zachry Company, 362 U.S. 310. While it is true that the opinion in that case contains certain references to "local business," to "activities of a dominantly local character," to "primarily local activities," and to "local production," we think that the trial judge was misled by the use of these phrases, and that, contrary to the trial court's opinion, the Zachry decision does not hold that

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[1]Note that so stated this is not precisely the question involved under the Act which states the important query to be whether "such employee was employed . . . in any closely related process or occupation directly essential to the production thereof, in any state." (Emphasis added.)

employment in "a local business" excludes it from being treated as employment in the production of goods for commerce.

The court below fell into the same error which led to the decision of the Court of Appeals for the Fourth Circuit in Mitchell v. Lublin, McGaughy & Assoc., 250 F. 2d 253, 259. In that case the employees involved were draftsmen, field clerks and stenographers employed by an architectural firm. All of these employees worked with plans and specifications prepared by their employer for the repair and construction of various interstate instrumentalities including air bases, roads, radio and television installations. The Court of Appeals held that "the defendants in this case were independent engineers and architects engaged in essentially local activity in each of the offices which they maintained." Referring to the fact that the firm sent telegraph messages, and used the mails to transmit documents to other states, the court said (pp. 259-260): "[W]here the business is essentially local and there is no production of 'goods,' communication which is merely incidental to the local enterprise cannot be classed as commerce. . . . [T]he Act does not attempt to regulate local activity. . . . [T]he architectural work itself was local and of necessity gave color to the activities of their subordinates and took them outside the scope of the statute." After grant of certiorari this judgment of the Court of Appeals was reversed, Mitchell v. Lublin, McGaughy & Asso., 358 U.S. 211. The Supreme Court noted that the decision of the lower court was based upon its conclusion that the activities of the employing

firm were "local in nature." It held, however, that in order to determine whether these employees were engaged in commerce "we focus on the activities of the employees and not on the business of the employer." Said the Court (p. 212): "The test is 'whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interestate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.' . . . . Respondent contends that *its* activities are essentially local in nature. But as we stated, Congress deemed the activities of the individual employees, not those of the employer, the controlling factor in determining the proper application of the Act. Here the activities of the employees show clearly that they are 'engaged in commerce' and thus are eligible for the protections afforded by the Act."

It is important to note that in the language just quoted the Supreme Court first inquired whether the work of the employees is "directly and vitally related to the functioning of an instrumentality or facility of interstate commerce." If that question is answered in the affirmative then it can be said that the enterprise is not a local activity. It is obvious that the Court of Appeals in that case, as did the court below in this case, began its inquiry at the wrong end by first asking whether the enterprise was a "local activity." As the Supreme Court in the Lublin case, above, made clear, that is in nosense the test.

In the Zachry case, supra, upon which the trial court relied, the respondent employer was a construction

contractor employed to construct a dam for impounding water for a water district to supply water to the City of Corpus Christi. An unspecified amount of the water supplied by the district was consumed by facilities and instrumentalities of commerce. It was plain here that neither the city nor the district was engaged in the production of goods for commerce. The Court held in that case "neither a facility of 'commerce' nor a facility of 'production' is under construction. Operation of the completed dam will merely support production facilities; and construction of the dam is yet another step more remote." (p. 319) Thus the decision is based upon the Court's finding of the remoteness of the construction from any facility of commerce or of production that might be within the terms of the Act, and not upon any finding that the construction work was of "a local character."* In setting forth the test to be applied in a case of this kind the Court made it plain that an answer to the problem presented cannot be predicated upon a finding as to whether the enterprise carried on by the employer is local or otherwise. The Court alluded to (p. 315) "the governing principle that coverage turns upon the nature of the employees' duties, and not upon the nature, local or interstate, of the employer's general business."

A Supreme Court case whose facts most closely re-

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*After finding the construction to be too remote from any production of goods for commerce to be either "closely related" or "directly essential" to production, it was not inappropriate for the Court to conclude that it was dealing with something which had a "local character".

semble those in the case now before us is Roland Co. v. Walling, 326 U.S. 657 (1949). Roland Co. was engaged in manufacturing, installing, and servicing electrical motors, generators, etc. A substantial portion of its business was done with companies directly engaged in interstate commerce. During practically every work week Roland's mechanics did some of this work for some of these customers, either in the repair of their motors or generators, in the reconstruction of used motors sold to them, or in performing electrical work at their establishments. It was held that these employees were engaged in the production of goods in interstate commerce and that they were within the coverage of the Act.

The court below declined to follow the Roland case on the ground that the 1949 amendment of the Act[2] undercut its authority, holding that the later case of Zachry, supra, disclosed that the Roland case was no longer good law.

In a later portion of this opinion we shall have occasion to point out the very limited effect which the 1949 amendment had with respect to the authority of Roland. The legislative history of the 1949 amendment shows beyond doubt that the holding in Roland that

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[2]In 1946 Sec. 3(j) instead of referring as at present, to "any closely related process," etc., used the words "*any process or occupation necessary to the production thereof* in any state." By the 1949 amendment the italicized words just quoted were changed to the language of the Act which now reads 'any closely related process or occupation directly essential to the production thereof in any state."

those employees were engaged in the production of goods in interstate commerce and were within the coverage of the Act, would not be affected by the 1949 amendment. During the discussion of the amendment on the floor of the Senate, Senator Holland, the main sponsor of the amendment, answering a question whether Roland would "be decided any differently under the proposed amendment," answered "definitely not." (95 Cong. Rec. 12505.) And in connection with the Conference report on the bill, the House Managers reported: "The bill as agreed to in conference also does not affect the coverage under the act of employees who . . . make, repair or maintain machinery or tools and dies used in the production of goods for commerce. . . . All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce." (Conference Report, Statement of the House Managers, U.S. Code & Cong. Serv., 91st Cong., 1st Sess. p. 2253.)

This brings us to the question which, as indicated in the Lublin case, supra, must be answered to resolve the first point presented here. We inquire whether the work of these employees of defendant was "so directly and vitally related to the functioning" of these potato processors, sugar mills, etc., as to be in practical effect a part of those interstate enterprises. In the words of the Act, the inquiry is whether these employees were engaged "in any closely related process or occupation directly essential" to the production which was carried on by the potato and sugar processors, etc., previously

mentioned. We think it is plain that the answer must be in the affirmative.

As we have indicated above, the trial court, besides holding that these employees were not covered by the Act, held also that defendant was exempt from the Act's minimum wage and overtime requirements by reason of its being recognized as an establishment engaged in retail sales or services in the industry.[10] It is plain that this finding of the court was predicated upon testimony which defendant offered to the effect that within the industry the defendant's business was and is considered to be retail. We think that such is not an appropriate basis upon which to determine whether the retail exemption applies to the defendant in this case. In Mitchell v. Kentucky Finance Co., 359 U.S. 290, the defendant had succeeded in the Court of Appeals in maintaining its assertion of the retail exemption on the ground that "their activities are recognized in the financial industry as being 'in the retail end' of the industry." In reversing the decision of the Court of Appeals, the Supreme Court made it plain that even though an establishment's activities might be recognized as being retail in the particular industry, the establishment does not come within the meaning of the

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[10]The court's opinion stated as follows: "The Court finds from the evidence that all of defendant's sales were within the State of Idaho and its products were not sold for resale. The Court also finds from the evidence that the business conducted by defendant was and is considered to be retail within the industry as shown by the testimony of the manager of defendant corporation and representatives of companies selling materials to defendant."

retail exemption unless its business falls within the "retail concept" of the Act. We had occasion to note this in Goldberg v. Roberts, 9 cir., 291 F. 2d 532, 534. As we there said: "If by its nature appellee's business is 'outside the retail concept' the Sec. 13 exception cannot apply."

The trial court here decided that defendant's business was within the retail concept in the following manner: It noted that in Roland, supra, the Supreme Court had held that concern outside the retail concept. There the Court said (p. 666): "[T]he exemption reaches employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." It seems obvious that if the tests applied in the Roland case are applied here, we must conclude that the defendant is not within the retail exemption.

The trial court disregarded the Roland test stating that the retail concept described in Roland "was repudiated by the 1949 amendment to the Act", citing Mitchell v. Kentucky Finance Co., supra. But the latter case shows that the 1949 amendment served no such purpose. The Roland case had indicated approval of a rule to the effect that sales of goods or service for "business use" were not retail. The Kentucky Finance case shows, as does the legislative history of the 1949 amendment, that the sole purpose of that amendment was to do away with this "business use" test. The Court said:

"We find nothing in the debates or reports which suggests that Congress intended by the amendment to broaden the fields of business enterprise to which the exemption would apply. Rather it was time and again made plain that the amendment was intended to change the prior law only by making it possible for business enterprises otherwise eligible under existing concepts to achieve exemption even though more than 25 percent of their sales [were not retail under the old business use test]." 359 U.S. at 294. To the same effect see Goldberg v. Roberts, supra. That the 1949 amendment had this limited effect is clear from the legislative history of that amendment."

When we consider all the facts in the present case, the operation in a factory-like building equipped only for manufacture and repair of the fabricated metal products, with a substantial portion of the time of its employees devoted to fabricating large metal equipment for use by potato processors, sugar mills and similar enterprises, we cannot agree that the enterprise fell within the retail concept described and referred to in these decisions.

"Representative Lesinski, one of the Managers for the House, referring to a reference to Roland in the House Managers' Statement, stated that this reference "should not mislead anyone into concluding that the conference intended to reverse or nullify that decision" (95 Cong. Rec. 14942).

The Senate Conferees' report stated that the amendment did not change the status of establishments "selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment in Roland Electrical Co. v. Walling, (326 U.S. 657)." (95 Cong. Rec. 14877.)

In addition we should note that the 1949 amendments to the Act recited that prior rulings by the Administrator with respect to enterprises within or without the retail exemption should remain in effect unless inconsistent with the statute as amended. In his 1942 Wage and Hour Manual, p. 326, secs. 29-31, the Administrator listed types of business which were outside the retail exemption and which were similar to the business of the defendant. Among these were "machine shops and foundries", "industrial blacksmiths" and "establishments engaged in sharpening and reconditioning industrial tools."

We hold that the defendant was not engaged in business within the retail exemption provisions of Sec. 13 of the Act.

The judgments are reversed and the causes remanded with direction to enter judgments for the appellant.

FILED
DEC 11 196
JOHN F. DAVIS, CL

In the Supreme Court of the United States

October Term, 1964

No. [redacted] 30

ADDENDA—APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

No. 18,887

IDAHO SHEET METAL WORKS, INC., a corporation,

Appellee

Appeal from the United States District Court for the District of Idaho.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded

to the said District Court with direction to enter judgment for the appellant.

DEC 11
JOHN F. DAV

Filed and entered Aug. 10, 1964.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

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This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court with direction to enter judgment for the appellant.

Filed and entered Aug. 10, 1964.